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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. HECTOR LOU COTTO, Defendant and Appellant.	E071121 (Super.Ct.No. RIF1702987) OPINION

APPEAL from the Superior Court of Riverside County. Emma C. Smith, Judge. Dismissed.

David Dworakowski, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Arlene A. Sevidal, Andrew Mestman and Collette C. Cavalier, Deputy Attorneys General, for Plaintiff and Respondent.

On September 1, 2017, defendant and appellant, Hector Lou Cotto, pled guilty to criminal threats. (Pen. Code, § 422; count 2).[1] Pursuant to his plea agreement, the court sentenced defendant to 36 months of probation on various terms and conditions. On April 19, 2018, defendant admitted violating a term of his probation. In accordance with his plea agreement, the court sentenced defendant to 16 months of prison concurrent to his sentence in another case. On appeal, defendant contends the court's imposition of a criminal protective order (CPO) when it initially placed him on probation was unauthorized by law. We dismiss the appeal.

I. FACTUAL AND PROCEDURAL BACKGROUND

On August 21, 2017, the People charged defendant by felony complaint with assault with a semiautomatic firearm upon the person of Marco C. (§ 245, subd. (b); count 1), criminal threats against Marco C. (§ 422; count 2), and assault with a firearm upon the person of Marco C. (§ 245, subd. (a)(2); count 3). The People additionally alleged as to each count that defendant personally used a firearm. (§§ 12022.5, subd. (a), 1192.7, subd. (c)(8).)

On September 1, 2017, defendant pled guilty to the count 2 offense of committing criminal threats against Marco C. The minute order reflects that the "Court [found] [the] factual basis for the plea is based on Oral Statement[s] from Defendant on the record."[2]

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[1] All further statutory references are to the Penal Code.

[2] Appellate counsel has not provided the court with a reporter's transcript of the plea.

Defendant initialed the portion of the plea agreement reflecting: "I agree that I did the things that are stated in the charges that I am admitting." Defendant waived his right to appeal as part of the plea agreement.

Pursuant to his plea agreement, the court sentenced defendant to 36 months of probation on various terms and conditions, including that he obey a CPO barring him from having contact with Marco C.: "Criminal Protective Order—Other than Domestic Violence—CPO 136.2 PC issued. Expires 09/01/2020. Comment: No Contact. [¶] Defendant has been served with the Criminal Protection Order." The minute order reflects that "[d]efendant accepts [the] terms and conditions of probation." Defendant, apparently contemporaneously signed a sentencing memorandum barring him from having "direct or indirect contact with Marco C." Defendant's signature signified he had read, understood, and accepted "these terms and conditions of probation . . . ."

On December 26, 2017, the People filed a petition to revoke defendant's probation. The People alleged defendant violated his probation by possessing ammunition as a prohibited person. (§ 30305, subd. (a); count 1.)

On April 19, 2018, as part of an agreement with the People, defendant admitted violating his probation in return for a 16-month prison sentence to be served concurrently with his sentence in another case. On May 31, 2018, the court sentenced defendant to the low term of 16 months of prison concurrent to his sentence in another case. On July 30, 2018, defendant filed a notice of appeal requesting the issuance of a certificate of

probable cause based upon ineffective assistance of counsel. The court denied the request.

II. DISCUSSION

Defendant contends the court's issuance of the CPO was unauthorized by law. We dismiss defendant's appeal as untimely.

A. *Timeliness*

The defendant has 60 days from the date of the judgment to file an appeal; failure to file a timely appeal shows acquiescence in the judgment. (*People v. DeLouize* (2004) 32 Cal.4th 1223, 1232-1233.) Defendant appeals from the order dated May 31, 2018, sentencing him to a 16-month concurrent prison term after he admitted violating the terms of his probation. However, the hearing during which the court issued the CPO occurred on September 1, 2017. Defendant's notice of appeal dated July 31, 2018, was filed long after the time for filing an appeal from the court's issuance of the CPO had expired. Thus, the appeal must be dismissed.

B. *Certificate of Probable Cause*

Assuming the appeal is timely, the People maintain defendant's appeal should be dismissed for failure to obtain a certificate of probable cause. An appellate challenge to any aspect of a plea agreement requires the issuance of a certificate of probable cause. (*People v. Johnson* (2009) 47 Cal.4th 668, 678.) Here, the CPO appears to be an aspect of the plea agreement which, if the appeal had been timely filed, would have required a certificate of probable cause.

Concurrently with the entry of his plea, defendant signed a sentencing memorandum outlining the terms and conditions of his probation, which included a term requiring that he have no contact with Marco C. The minute order reflects defendant accepted the terms and conditions of probation, which included the CPO. The court noted that defendant had been served with the actual CPO. Thus, the CPO was a term of defendant's probation which was an aspect of his plea agreement. Therefore, had defendant timely filed the notice of appeal, we would still be required to dismiss the appeal for his failure to acquire a certificate of probable cause as a challenge to the CPO is a challenge to the plea agreement.

C. *Forfeiture*

When a defendant fails to object below to the imposition of a probation condition, the defendant forfeits the issue on appeal unless the defendant presents a claim that the condition is facially unconstitutional. (*In re Sheena K.* (2007) 40 Cal.4th 875, 880-888.) Here, defendant's challenge to the issuance of the CPO is that it was statutorily unauthorized because it was limited to the pendency of the criminal proceedings and could not extend beyond sentencing because the exception for domestic violence was inapplicable.

First, whether a probation condition is statutorily unauthorized, which can be forfeited, is not the same as being facially unconstitutional, which cannot. Second, although the minute order and CPO explicitly reflect the CPO was "Other than Domestic Violence," the terms and conditions signed by defendant reflects no such limitation.

Indeed, the CPO itself expressly references section 136.2, subdivision (i)(1), the section explicitly dealing with domestic violence CPO's which may extend up to 10 years beyond sentencing. Thus, determining whether the CPO qualifies under the domestic violence exception requires resort to the facts of the case. As we shall discuss below, there is at least some reason to believe this matter concerned domestic violence in the broad construction in which the issuance of CPO's are interpreted. Thus, defendant forfeited the issue of whether the CPO was unauthorized by expressly agreeing to the condition, failing to object to it at his original sentencing, and failing to object to it at his sentencing on his violation of probation.

D. *Validity of the CPO*

Assuming we can reach the issue, defendant contends the court's issuance of the CPO was unauthorized because it was statutorily limited to the pendency of the criminal proceedings and could not extend beyond sentencing because the exception for domestic violence was inapplicable. Defendant has not provided this court with a sufficient record for us to make the determination that the domestic violence exception was inapplicable. Moreover, at least some portions of the record suggest that the offense for which defendant pled guilty would constitute domestic violence within the broad definition applicable to CPO's.

"Section 136.2, subdivision (i)(1) provides, in pertinent part: 'In all cases in which a criminal defendant has been convicted of a crime involving domestic violence . . . , the court, at the time of sentencing, shall consider issuing an order restraining the

defendant from any contact with the victim. The order may be valid for up to 10 years, as determined by the court. . . . It is the intent of the Legislature in enacting this subdivision that the duration of any restraining order issued by the court be based upon the seriousness of the facts before the court, the probability of future violations, and the safety of the victim and his or her immediate family.' 'As used in the chapter containing section 136.2, subdivision (i)(1), "'[v]ictim' means any natural person with respect to whom there is reason to believe that any crime as defined under the laws of this state . . . is being or has been perpetrated or attempted to be perpetrated." (§ 136, subd. (3).)' [Citations.]" (*People v. Race* (2017) 18 Cal.App.5th 211, 216-217.) "With respect to the issuance of a legally authorized criminal protective order, ""'We imply all findings necessary to support the judgment, and our review is limited to whether there is substantial evidence in the record to support these implied findings.'" [Citation.]' [Citation.]" (*Id*. at p. 217.)

In *Race*, we held that "the term 'victim' pursuant to section 136.2 criminal protective orders must be construed broadly to include any individual against whom there is 'some evidence' from which the court could find the defendant had committed or attempted to commit some harm within the household." (*People v. Race*, *supra*, 18 Cal.App.5th at p. 219.) We further held that "in considering the issuance of a criminal protective order, a court is not limited to considering the facts underlying the offenses of which the defendant finds himself convicted . . . ." (*Id*. at p. 220.) "[I]n determining

whether to issue a criminal protective order pursuant to section 136.2, a court may consider all competent evidence before it." (*Ibid*.)

"'Perhaps the most fundamental rule of appellate law is that the judgment challenged on appeal is presumed correct, and it is the appellant's burden to affirmatively demonstrate error.' [Citation.] '"We must indulge in every presumption to uphold a judgment, and it is defendant's burden on appeal to affirmatively demonstrate error—it will not be presumed. [Citation.]" [Citations.]' [Citation.]" (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 549.) "[D]efendant further bears the burden to provide a record on appeal which affirmatively shows that there was an error below, and any uncertainty in the record must be resolved against the defendant. [Citations.]" (*Ibid*.) "'"[I]t is settled that: 'A judgment or order of the lower court is *presumed correct.* All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.' [Citation.]" [Citation.]' [Citation.] 'The orders of the trial court are presumed to be valid and defendant has the burden of providing a record adequate to support his arguments on appeal.' [Citation.]" (*Ibid*.)

The minute order reflects that the factual basis for the plea was "based on Oral Statement[s] from Defendant on the record." However, defendant has not seen fit to provide this court with the transcript from defendant's plea. Thus, we cannot discern from the record whether defendant's offense would have come within the broad

definition of domestic violence applicable to CPO's. Indeed, as the People point out, the victim of the crime and object of the protective order shares the same last name as defendant, which suggests they may be related. Moreover, at the sentencing hearing on defendant's violation of probation, defendant stated: "I'm going to jail because I said to my brother—." Thus, the offense for which defendant pled guilty may very well have been committed within defendant's household, which would qualify for the issuance of a domestic violence CPO. Without a record reflecting the factual basis for defendant's plea, we will indulge in every presumption in favor of the judgment.

III. DISPOSITION

The appeal is dismissed.

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McKINSTER
Acting P. J.

We concur:

MILLER
J.

RAPHAEL
J.